IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

JULIA HERSEY WARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 71-576

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OPINION BELOW

The court of appeals decision and judgment are not reported (Pet. Ex. A1-A2).

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1971. A petition for rehearing was denied on September 27, 1971. On October 29, 1971, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where the defense was entrapment, receipt of petitioner's admissions was prejudicial assuming that the warnings which preceded them did not comply with *Miranda* v. *Arizona*, 384 U.S. 436, and whether the warnings were adequate under *Miranda*.

2. Whether submission of the question of entrapment to the jury was error.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Alabama, petitioner was convicted of having custody of an unregistered still, the fermenting of distilled spirits on premises not designated as a distilled spirits plant, and the possession of one hundred and ten gallons of distilled spirits in unstamped containers, in violation of 26 U.S.C. 5601(a)(1) and (7) and 5205(a)(2). The court of appeals affirmed without opinion (Pet. Ex. A).

The evidence is not in dispute. It showed in summary that in September 1969 one Dotson and one Morrison had discussed dealing in illicit whiskey.[1] Dotson, a convicted bootlegger, reported these discussions to a member of the Alcohol, Tobacco and Firearms Division of the Treasury Department and agreed to become a paid informant (R. 298-310).[2]

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[1] Each witness testified that the other had made the initial solicitation (R. 307, 355).

[2] "R." designates the transcript of the trial proceedings, to be lodged with the Court.

Thereafter on October 9, 1969, Dotson bought three hundred and fifteen gallons of unstamped liquor from Morrison with funds supplied by Treasury agents (R. 287, 370-373). Dotson asked Morrison to find someone to supply up to two thousand gallons of such liquor a week (R. 355-358). Morrison approached petitioner, who agreed to supply the liquor (R. 363).[3]

Acting on Dotson's information, federal agents discovered an unregistered distillery in the woodlands of Hale County, Alabama (R. 85, 90-91). The agents put the stills under observation and on October 22, 1969, petitioner was observed driving a truck to the stills and unloading several large drums including two of fifty-five gallons. Agents took photographs of petitioner as he drove into and out of the distillery site which were introduced at trial (R. 94-106). On October 23, 1969, petitioner returned to the stills in the same truck. When the agents sought to arrest him, petitioner drove quickly away but was apprehended nearby a short time later. The truck contained two fifty-five gallon drums of whiskey on which there were no tax stamps (R. 109-113, 126, 174-179).

After his arrest petitioner made on oral admission to a federal agent. A hearing on *voir dire* was held on the admissibility of the statement. Agent Pike testified that after placing petitioner in the police car he had warned petitioner as follows (R. 114-115):

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[3] Morrison stated (R. 390): "I just went over there [to petitioner's home] and asked him * * *. I just told him what the guy would take and maybe he could make some money off of it."

I told him before we asked him anything it was my duty to advise him of his Constitutional rights. I told him he was entitled to the advice of an attorney of his choice, if he could not hire one, one would be appointed for him at no cost to him by the Commissioner or the Court officials. I told him if he started to answer questions without an attorney that he could stop the questioning at any time for the purpose of consulting an attorney, or stop the questions at any time. I told him he had a right to waive advice of counsel and to answer any questions or to make any statement he so desired in my presence. Area Supervisor Dickinson asked him if he understood his rights and he said he did.

On cross-examination, the following colloquies occurred (R. 117, 119):

Q. Did you tell him when an attorney would be appointed for him if he so desired?
A. No, sir, I told him if he wanted an attorney, he could have the attorney of his choice or the Court would appoint him one.
Q. And when would he be appointed by whom?
A. By the Commissioner or other court officials.

* * * *

THE COURT: What, if anything, did you say about when an attorney would be appointed for him, before the questioning or did you just leave it up in the air?
A. I told 'm that if he desired an attorney and could not afford one, the United States Commissioner or the Court would appoint him a lawyer.

The defendant testified that he had not been mistreated in any way from the time of his arrest until he talked to Agent Pike in the Federal Building and that there was no extensive questioning of him during that period (R. 125).

At the conclusion of the *voir dire* hearing, the trial court permitted Pike to testify before the jury that following the warnings petitioner had admitted that the distillery was his, and that he was "involved" in it (R. 128).

Petitioner's defense consisted of testimony of various witnesses through whom he sought to establish entrapment on the basis that government agents had provided the money and initiative for petitioner to establish the illegal distillery (R. 225-390).

ARGUMENT

1. Petitioner contends that the introduction of his admissions at trial was erroneous because he was inadequately warned of his rights under *Miranda* v. *Arizona*, 384 U.S. 436. Even if the admissions of petitioner were improperly admitted under *Miranda* he was not harmed by their introduction, since, by raising the defense of entrapment, petitioner was required, in the Fifth Circuit as well as most other circuits, to admit his commission of the acts charged in the indictment.[4] *McCarty* v. *United States*, 379 F. 2d

[4] It is clear on this record that petitioner's decision to raise the entrapment defense was not prompted by the introduction of his inculpatory statements but from the totality of the government's evidence, which plainly established his involvement in the acts charged. Compare *Harrison* v. *United States*,

285 (C.A. 5), certiorari denied, 389 U.S. 929;[5] *United States* v. *Rodrigues*, 433 F. 2d 760 (C.A. 1), certiorari denied, 401 U.S. 943; *United States* v. *Mehciz*, 437 F. 2d 145, 149 (C.A. 9), certiorari denied, 402 U.S. 974.[6] Thus, introduction of petitioner's statements, even if error, was harmless beyond any reasonable doubt.

Moreover, the warnings of his right to counsel were sufficient. Petitioner was told that he was entitled to consult an attorney, and, if he could not afford one, one would be appointed for him by the Commissioner or the court. *Lathers* v. *United States*, 396 F. 2d 524 (C.A. 5), relied upon by petitioner is not in point. In *Lathers*, the warnings were insufficient to inform the defendant of his right to have an appointed attorney "present with him" during questioning, and not just that "a judge or commissioner somewhere

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392 U.S. 219. It is also clear that the admissions in no way prejudiced his entrapment defense (see, Pet. 8).

[5] Petitioner's reliance (Pet. 9) on *Henderson* v. *United States*, 237 F. 2d 169 (C.A. 5), is unfounded. The Fifth Circuit held there that a defendant charged with conspiracy could deny commission of certain overt acts and nonetheless raise the defense of entrapment. See also *United States* v. *Harrell*, 436 F. 2d 606, 611-612 (C.A. 5). The court in *McCarty*, *supra*, distinguished *Henderson* as an exception to the general rule that, in order to advance entrapment, an accused must admit the commission of the offense.

[6] Only the District of Columbia Circuit has held to the contrary. *Hansford* v. *United States*, 303 F. 2d 219, 221 (*en banc*). There is language to the same effect in *Crisp* v. *United States*, 262 F. 2d 68, 70 (C.A. 4), but there the defendant did not deny having narcotics, claiming merely that he did not transfer it because the agents snatched it from his hands.

down the line would appoint a lawyer for him if he so requested." 396 F. 2d at 535. Here petitioner was told that if "he started to answer questions without an attorney that he could stop the questioning at any time for the purpose of consulting an attorney." Petitioner was thus advised of his right to the aid of court-appointed counsel *during* questioning. See, *e.g.*, *Sweeney* v. *United States*, 408 F. 2d 121, 124 (C.A. 9); *United States* v. *Vanterpool*, 394 F. 2d 697 (C.A. 2).

2. Petitioner also contends that the evidence established entrapment as a matter of law. As the statement shows, *supra*, there was ample evidence of petitioner's predisposition. The entrapment issue was therefore properly submitted to the jury under appropriate instructions.[7] See *Sherman* v. *United States*, 356 U.S. 369, 377; *United States* v. *Harrell*, *supra*, 436 F. 2d at 612.

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[7] The court charged (R. 211-212): "If then the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred with respect to the alleged offense involved in this case, the defendant was ready and willing to commit the crime charged in the indictment whenever opportunity was afforded and the Government officers or agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment".

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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